IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. [redacted]

In the Matter

of

The Petition of New York Tank Barge Corporation, as Chartered Owner of the Tank Barge "T. N. No. 735", for Exoneration from or Limitation of Liability.

Consolidated Molasses Corporation,

Petitioner,

v.

New York Tank Barge Corporation, as chartered owner of the Tank Barge "T. N. No. 735",

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

T. CATESBY JONES,
LEONARD J. MATTESON,
Proctors for Petitioner.

INDEX.

Table of Cases Cited:

OTHER AUTHORITIES CITED:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. ————

In the Matter

of

The Petition of NEW YORK TANK BARGE CORPORATION, as Chartered Owner of the Tank Barge "T. N. No. 73", for Exoneration from or Limitation of Liability.

COMMERCIAL MOLASSES CORPORATION,

Petitioner,

v.

NEW YORK TANK BARGE CORPORATION, as chartered owner of the Tank Barge "T. N. No. 73",

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States.

The petition of Commercial Molasses Corporation, claimant for the loss of a cargo of molasses laden on board Tank Barge "No. 73", for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, respectfully shows:

STATEMENT OF MATTER INVOLVED.

This is a proceeding in admiralty instituted by New York Tank Barge Corporation, as chartered owner of

the Tank Barge "T. N. No. 73", when it filed a petition in the United States District Court for the Southern District of New York, praying for exoneration from, or limitation of, liability. The sole claimant in this proceeding, your petitioner, Commercial Molasses Corporation, filed claim to recover the value of its cargo of molasses laden on board the Tank Barge "T. N. No. 73" which was lost on October 27, 1937 when that vessel sank during loading.

Commercial Molasses Corporation, a new York corporation, had purchased a cargo of molasses from United Molasses Company, Limited, a British corporation (R. 183). This cargo had arrived on the S. S. "Athelsultan" which docked at Pier 1, Hoboken, New Jersey, prior to October 24, 1937, the date of this accident. New York Tank Barge Corporation, pursuant to the terms of a contract of affreightment with your petitioner (Ex. 6, R. 261; Fdgs. 3 and 4, R. 306-7), furnished the barge "T. N. No. 73" to receive a portion of the cargo from the ship for carriage from Pier 1, Hoboken, to claimant's plant at Baldwin Avenue, Weehawken, New Jersey (Fdg. 11, R. 308). On the evening of October 23, 1937 the "T. N. No. 73" was placed alongside the "Athelsultan", the discharge hose of the ship was coupled to the receiving equipment of the barge located about amidships, and the pumping of molasses from the ship began at 9.05 P. M.

The District Court found that when approximately 156,607 gallons of molasses (11.9 lbs. per gallon) had been pumped into the "T. N. No. 73" (Fdg. 29, R. 316) the barge sank thus causing the loss and damage claimed.

There was no unusual condition of wind or weather to account for the sinking of the barge. In that situation the claimant cargo owner relied on the presumption of unseaworthiness resulting from the unexplained sinking of the barge and the warranty of seaworthiness in the

contract of carriage as the basis for recovery from the barge owner.

The barge owner attempted to rebut the presumption of unseaworthiness (1) by offering testimony of good condition of the barge and (2) by asserting that the sinking was due to the negligence of the mate of the barge in overloading the after tanks. The District Court held that the evidence on both points was insufficient.

Findings and Conclusions of the Courts Below:

The Circuit Court of Appeals accepted the findings of the District Court (R. 341) and the findings of the Courts below were, therefore, concurrent. The two courts differed on questions of law.

The District Court's Findings and Conclusions.

As to the loss being caused by negligence not associated with seaworthiness, the District Court said: "I do not find the evidence sufficient to establish this as a fact" (Fdg. 28, R. 316). The barge owner relied upon a witness, the mate of the barge, to establish negligence, but as to him the District Court found that his testimony was so unreliable that the Court was "left to sheer guesswork in attempting to draw any conclusions from this testimony" (Fdg. 40, R. 320, 321). As to the barge owner's explanation of the sinking through alleged overloading the District Court found that the barge owner's testimony was entirely unsatisfactory. The District Court said:

> "After an examination of their computations I was of the opinion that their estimates and conclusions were not well founded and could not form a satisfactory basis for determining whether at the time

of the accident the after tanks had been overloaded, through the negligence of the mate of the barge" (Fdg. 35, R. 318).

With respect to the testimony of the shipowner's surveyors who examined the barge after she was raised, the District Court found:

> "The barge was in such a battered condition after the salvage operations, that the inspections later made in drydock were necessarily inconclusive. All that could be said of them is that they failed to disclose the cause of the sinking and in view of the condition of the barge nothing more could have been expected" (Fdg. 25, R. 314).

The conclusions of the District Court were:

> "1. When a boat sinks in smooth water and without external contact of any kind there is a presumption of unseaworthiness. As I have found as a fact that there is not sufficient evidence to rebut this presumption, I find that this loss resulted from unseaworthiness. *The Emergency*, 9 F. Supp. 484; *The Jungshored*, 290 F. 733; *The Calvert*, 51 F. (2d) 494 (R. 324).
>
> 2. The fact that the best that can be said of the state of the record is that the cause of the accident has been left in doubt does not help the petitioner in these limitation proceedings, because from that doubt the law draws a presumption of unseaworthiness which deprives petitioner of the right to limit liability to the value of the barge and her freight then pending" (R. 324).

The District Court then proceeded to hold against petitioner because in his opinion the barge owner's express

obligation to furnish a seaworthy vessel was overridden by another clause of the contract which required the cargo owner to procure insurance.

Your petitioner, the cargo owner, thereupon appealed to the Circuit Court of Appeals from that portion of the decree which exonerated the barge owner from liability under its interpretation of the insurance clause (R. 330). The barge owner filed cross-assignment of errors (R. 334) to that portion of the decision which held that the barge was unseaworthy and that limitation of liability should be denied.

The Decision of the Circuit Court of Appeals.

The Circuit Court of Appeals left undecided the question raised on your petitioner's appeal, although the presiding Judge stated during the oral argument that in his opinion your petitioner's appeal was well founded. No other conclusion is compatible with the Court's former decision in *Sanbern* v. *Wright & Cobb Lighterage Co.*, 171 Fed. 449, 454, aff'd (C. C. A. 2) 179 Fed. 1021. The Court stated in its opinion that its conclusion on the question of seaworthiness rendered it unnecessary to pass on the effect of the insurance provision of the charter (R. 345).

The Circuit Court of Appeals held that since your petitioner's cause of action is based on breach of warranty of seaworthiness "the promisee has the burden of proving the breach, by which we mean that, if the Judge is unable to make up his mind upon the issue, the promisee fails" (R. 341), that the cargo owner must "lay any doubts which remain when the whole evidence is in" (R. 344) and that since the District Court was unable on the evidence to ascertain the cause of the sinking, the District Judge erred in taking "recourse to the presumption

which he supposed to persist as a determining legal factor" (R. 345). This conclusion of the Circuit Court of Appeals is in square conflict with the decision of this Court in the *Edwin I. Morrison*, 153 U. S. 199. In that case this Court held at page 211:

> "Perils of the sea were excepted by the charter party, but the *burden of the proof was on the respondents to show that the vessel was in good condition and suitable for the voyage at its inception*, and the exception did not exonerate them from liability for loss or damage from one of those perils to which their negligence, or that of their servants, contributed. *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 438. *It was for them to show affirmatively the safety of the cap and plate; and that they were carried away by extraordinary contingencies, not reasonably to have been anticipated.*"

This Court stated the question involved at page 212:

> "In any aspect, the real point in controversy is, *did the respondents so far sustain the burden of proof which was upon them* as to render the probability that the cap and plate were in good condition and knocked off through extraordinary contingencies so strong as to overcome the inference that they were not in condition to withstand the stress to which on such a voyage it might reasonably have been expected they would have been subjected? *If the determination of this question is left in doubt, that doubt must be resolved against them.*"

At page 215, this Court said:

> "The obligation rested on the owners to make such inspection as would ascertain that the caps and plates

were secure. Their warranty that the vessel was seaworthy in fact 'did not depend on their knowledge or ignorance, their care or negligence.' *The burden was upon them to show seaworthiness, and if they did not do so, they failed to sustain that burden*, even though owners are in the habit of not using the precautions which would demonstrate the fact. In relying upon external appearances in place of known tests, respondents took the risk of their inability to satisfactorily prove the safety of the cap and plate if loss occurred through their displacement."

"*We are unwilling by approving resort to mere conjecture as to the cause of the disappearance of this cap and plate, to relax the important and salutary rule in respect of seaworthiness. The Reside*, 2 Sumner, 567, 574; *Douglas v. Scougall*, 4 Dow. H. L. 269." (All italics ours.)

The decision of the Circuit Court of Appeals is also in square conflict with the decision of this Court in *Schnell v. The Vallescura*, 293 U. S. 296, where this Court said at page 303:

"In general the burden rests upon the carrier of goods by sea to bring himself within any exception relieving him from the liability which the law otherwise imposes on him. This is true at common law with respect to the exceptions which the law itself annexed to his undertaking, such as his immunity from liability for act of God or the public enemy. See Carver, Carriage by Sea (7th ed.) Chap. 1. The rule applies equally with respect to other exceptions for which the law permits him to stipulate. *Clark v. Barnwell*, 12 How. 272, 280; *Rich v. Lambert*, 12 How. 347, 357; *The Propeller Niagara v. Cordes*, 21 How. 7, 29; *The Maggie Hammond*, 9 Wall. 435, 459;

The Edwin I. Morrison, 153 U. S. 199, 211; *The Folmina*, 212 U. S. 354, 361. The reason for the rule is apparent. He is a bailee entrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. *In consequence, the law casts upon him the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved from liability.* See *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, 184; *Chicago & Eastern Illinois R. Co. v. Collins Produce Co.*, 249 U. S. 186, 192, 193; *Railroad Co. v. Lockwood*, 17 Wall. 357, 379, 380." (Italics ours.)

The decision of the Circuit Court of Appeals is also in square conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the case of *S. C. Loveland Co. v. Bethlehem Steel Co.* (C. C. A. 3) 33 F. (2d) 655 where the Court said at page 657:

"A party rebutting the presumption [of unseaworthiness] *must show affirmatively that the damage was caused by a peril of the sea or other things excepted by the contract of affreightment and cannot absolve himself from blame by merely showing such a state of facts that the court is unable to discover how the disaster occurred, or that it might have occurred from something which, if only it were known, is a peril of the sea.* Work v. Leathers, 97 U. S. 379, 24 L. Ed. 1012; *The Queen* (D. C.), 78 F. 155; *Sanborn v. Wright & Cobb Lighterage Co.* (D. C.), 171

F. 449; *Tucker Stevedoring Co.* v. *Southwark Manufacturing Co.* (C. C. A.), 24 F. (2d) 410." (Italics ours.)

The decision of the Circuit Court of Appeals is also in square conflict with the principles established by a long line of decisions by the Circuit Courts of Appeal in the Third, Fourth, Fifth and Ninth Circuits. Among these decisions are the following:

The John Twohy (C. C. A. 3), 279 Fed. 343, 344 (reversed on other grounds, 255 U. S. 77);
Bank Line, Ltd. v. *Porter* (C. C. A. 4), 25 F. (2d) 843, 845;
Gardner, et al. v. *Dantzler Lumber & Export Co., Inc.* (C. C. A. 5), 98 F. (2d) 478, 479;
O. Y. Tonnage, A. B., et al. v. *Texas Co.* (C. C. A. 5), 296 Fed. 893, 896;
Pacific Coast S. S. Co. v. *Bancroft Whitney Co., et al.* (C. C. A. 9), 94 Fed. 180;
The Babin Chevaux (C. C. A. 9), 208 Fed. 966, 973;
The Indien (C. C. A. 9), 71 F. (2d) 752, 755.

The Questions Presented.

The questions presented are:

1 (a) Whether the presumption of unseaworthiness, which arises in favor of a cargo owner when a vessel sinks in calm weather, continues after the vessel owner has failed to rebut the presumption by reliable evidence? In other words, whether the presumption persists only when no evidence whatever is offered in rebuttal and does not persist when the evidence offered is found to be "not reliable" and of such a nature as to leave the

Court to "sheer guesswork in attempting to draw any conclusions" (Fdg. 40, R. 320-1).

(b) Whether the presumption of unseaworthiness continues when the Court finds that the evidence offered to displace the presumption is "not sufficient" to establish negligence not associated with unseaworthiness (Fdg. 28, R. 316), which was the only cause for the sinking not connected with unseaworthiness suggested by the vessel owner, particularly where such evidence failed "to disclose the cause of the sinking" (Fdg. 25, R. 314)?

(c) Whether after such evidence is offered the cargo owner must by affirmative evidence establish unseaworthiness by precise and specific evidence of the nature thereof?

(2) Whether in such case the burden of proof is not on the vessel owner to establish that his vessel was in fact seaworthy?

(3) Whether the long line of decisions of this Court, and of the Circuit Courts of Appeal for the Third, Fourth, Fifth and Ninth Circuits holding that the burden is on the vessel owner in such a case to establish seaworthiness of his vessel are now to be disregarded?

(4) Whether owners of goods are to be required to insure against a vessel owner's negligence in failing to provide a seaworthy ship.

Reasons for the Allowance of the Writ.

(1) The decision of the Circuit Court of Appeals of the Second Circuit in this case is in square conflict with the decision of this Court in *The Edwin I. Morrison*, 153 U. S. 199, and *The Valdesana*, 293 U. S. 296.

(2) The decision of the Circuit Court of Appeals for the Second Circuit in this case is in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *S. C. Loveland v. Bethlehem Steel Company*, 33 F. (2d) 655, and with the decisions in the Third, Fourth, Fifth and Ninth Circuits.

(3) The decision is of great importance to the merchants and insurers and other persons interested in goods carried by water. It relaxes "the important and salutary rule in respect of seaworthiness" by resorting "to mere conjecture as to the cause of" sinking of a vessel. Thus the Circuit Court of Appeals has overruled a principle of law laid down by this Court more than forty years ago in *The Edwin I. Morrison*, 153 U. S. 199, 215. It offers no valid reason for placing a burden of explanation on a shipper of goods when the carrier is, or should be, in possession of the facts. It suggests no valid reason for departing from "an important and salutary rule" which this Court has persistently refused to relax. *The Edwin I. Morrison*, 153 U. S. 199, 215. *The Vallescura*, 293 U. S. 296, 303.

(4) The relations between cargo shippers and vessel owners should not be made uncertain, and the law to be applied by Courts of Admiralty in each of the circuits should be uniform. If the decision of the Circuit Court of Appeals in this case is not reversed by this court that law will be left in uncertainty and confusion and the law in the various circuits will not be uniform.

(5) The decision of the District Court that a provision requiring a cargo owner to insure is sufficient to relieve a shipowner of the warranty of seaworthiness is unsound and not in harmony with the decision of this Court in *Cullen Fuel Co. v. Hedger*, 290 U. S. 82.

Wherefore, petitioner prays that this court issue a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit directing it to send to this court for review a full transcript of the record in the said Circuit Court of Appeals in the case entitled: *In the Matter of the Petition of New York Tank Barge Corporation, as Chartered Owner of the Tank Barge "T. N. No. 73", for Exoneration from or Limitation of Liability, Petitioner-Appellee, Commercial Molasses Corporation, Claimant-Appellant*, October Term 1939, No. 331 and that the decision of the said Circuit Court of Appeals rendered on the 30th day of July, 1940 (R., p. 330) and the order entered on the 20th day of August, 1940 (R. 346), be reversed, and for such further relief in the premises as may be just.

Dated, New York, November 18, 1940.

COMMERCIAL MOLASSES CORPORATION,
Petitioner.

By T. Catesby Jones,
Leonard J. Matteson,
Proctors for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. ————

In the Matter

of

The Petition of NEW YORK TANK BARGE CORPORATION, as Chartered Owner of the Tank Barge "T. N. No. 73", for Exoneration from or Limitation of Liability.

COMMERCIAL MOLASSES CORPORATION,

Petitioner,

v.

NEW YORK TANK BARGE CORPORATION, as chartered owner of the Tank Barge "T. N. No. 73",

Respondent.

BRIEF FOR PETITIONER.

Opinions Below.

The opinion of the District Court is not officially reported but is unofficially reported at 1939 A. M. C. 673 and printed in the record (R. 281). The findings of fact and conclusions of law of the District Court are printed in the record (R. 306).

The opinion of the Circuit Court of Appeals is officially reported 114 F. (2d) 248 and printed in the record (R. 339).

Jurisdiction of This Court.

This is an admiralty proceeding instituted by the New York Tank Barge Corporation, as chartered owner of the

Tank Barge "T. N. No. 73", by a petition for limitation of or exoneration from liability for damages resulting from the sinking of the barge "T. N. No. 73" at Pier 1, Hoboken, New Jersey, on October 24, 1937. The jurisdiction of this Court is invoked under Sec. 240 of the Judicial Code, as amended by the Act of February 13, 1925; 43 Stat. 938, 28 U. S. C. A. 347.

The Facts.

The facts are stated in the petition and will not be repeated here.

POINT I.

The decision of the Circuit Court of Appeals is in square conflict with decisions of this Court, notably *The Edwin I. Morrison*, 153 U. S. 199, in that it approves the resort to mere conjecture as to the cause of the sinking as a defense to the shipowner and by such conjecture throws upon a cargo owner the burden to show unseaworthiness. In so doing the Court has relaxed "the important and salutary rule in respect of seaworthiness" which this Court has repeatedly said should not be done.

Your petitioner's case rests solely on breach of the warranty of seaworthiness. We concede that the effect of the insurance clause in the contract of carriage in this case (R. 263, 322) is to release the carrier from liability for mere negligence other than failure to supply a seaworthy vessel. Negligence, as thus defined, is an excepted peril in the contract of carriage.

In the District Court the vessel owner attempted to bring itself within this exception but failed in the necessary proof (Fdg. 28, R. 316; Fdg. 35, R. 318). Never

theless, the Circuit Court of Appeals in this case held that, although the cargo owner at the outset had the benefit of a presumption of unseaworthiness since the vessel sank in calm water without apparent cause other than unseaworthiness to account for the sinking, this presumption did not "persist" after the vessel owner had offered proof to rebut the presumption, even though that proof was "not reliable", left the Court "to sheer guesswork" (Fdg. 40, R. 320-321), was not sufficient to establish a cause for the sinking other than unseaworthiness (Fdg. 28, R. 316) and failed "to disclose the cause of the sinking" (Fdg. 25, R. 314). The Circuit Court of Appeals concurred in the findings of the District Court, but nevertheless, held that the cargo owner must in these circumstances show unseaworthiness specifically. It therefore reversed the decision of the District Court on the ground that it was error for the District Court to take "recourse to the presumption which he supposed to persist as a determining legal factor" (R. 345).

The decision of the Circuit Court of Appeals is in square conflict with the decision of this Court in *The Edwin I. Morrison*, 153 U. S. 199. The facts in *The Edwin I. Morrison* did not involve a sinking but an admission of seawater to a cargo hold because a cap and plate covering the bilge pump hole became displaced. The cause of the displacement of the cap and plate was not known although it was shown that the vessel had encountered heavy weather which, however, was not so severe as to disturb the cap and plate if it had been sufficiently secured. On this state of the facts this Court stated the rule in precisely opposite terms from those used below. This Court said:

> "Perils of the sea were excepted by the charter party, but the *burden of the proof was on the re-*

spondents to show that the vessel was in good condition and suitable for the voyage at its inception, and the exception did not exonerate them from liability for loss or damage from one of those perils to which their negligence, or that of their servants, contributed. *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 438. It was for them to show affirmatively *the safety of the cap and plate; and that they were carried away by extraordinary contingencies, not reasonably to have been anticipated.*" *The Edwin I. Morrison*, 153 U. S. 199, 211.

* * *

"In any aspect, the real point in controversy is, *did the respondents so far sustain the burden of proof which was upon them* as to render the probability that the cap and plate were in good condition and knocked off through extraordinary contingencies so strong as to overcome the inference that they were not in condition to withstand the stress to which on such a voyage it might reasonably have been expected they would have been subjected? *If the determination of this question is left in doubt, that doubt must be resolved against them.*" *The Edwin I. Morrison*, 153 U. S. 199, 212.

* * *

"If, however, the vessel had been so inspected as to establish her seaworthiness when she entered upon her voyage, then upon the presumption that that seaworthiness continued the conclusion reached might follow, but we are of opinion that precisely here respondents failed in their case." *The Edwin I. Morrison*, 153 U. S. 199, 214.

* * *

"The obligation rested on the owners to make such

inspection as would ascertain that the caps and plates were secure. Their warranty that the vessel was seaworthy in fact 'did not depend on their knowledge or ignorance, their care or negligence.' *The burden was upon them to show seaworthiness, and if they did not do so, they failed to sustain that burden*, even though owners are in the habit of not using the precautions which would demonstrate the fact. In relying upon external appearances in place of known tests, respondents took the risk of their inability to satisfactorily prove the safety of the cap and plate if loss occurred through their displacement.

We are unwilling, by approving resort to mere conjecture as to the cause of the disappearance of this cap and plate, to relax the important and salutary rule in respect of seaworthiness. The Riverside, 2 Sumner, 567, 574; *Douglas* v. *Scougall*, 4 Dow, H. L. 269." *The Edwin I. Morrison*, 153 U. S. 199, 215. (Italics ours.)

The Edwin I. Morrison, *supra*, has been uniformly followed and applied in many decisions of this court.

Schnell v. *The Vallescura*, 293 U. S. 296, 304;
The Wilderoft, 201 U. S. 378, 389;
The Southwark, 191 U. S. 1, 6, 12;
International Navigation Co. v. *Farr*, 181 U. S. 218, 226;
The Irrawaddy, 171 U. S. 187, 190;
The Caledonia, 157 U. S. 124.

The principle established by *The Edwin I. Morrison*, that the burden of proof lies upon the vessel owner to prove the seaworthiness of the vessel supplied for the carriage of cargo and that any doubts must be resolved against the vessel owner, has been repeatedly applied in the various Circuits.

POINT II.

The decision of the Circuit Court of Appeals is in square conflict with the decisions of the Circuit Courts of Appeal for the Third, Fourth, Fifth and Ninth Circuits.

For conflict with the Circuit Court of Appeals for the Third Circuit, see S. C. Loveland Co. v. Bethlehem Steel Co., 33 F. (2d) 655. The legal situation in that case was the same as that which existed here. There the vessel owner was not a common carrier and the cargo owner relied not on the presumption of negligence arising out of the bailment but on the presumption of unseaworthiness arising from the unexplained sinking of the vessel. The Circuit Court of Appeals for the Third Circuit held that the presumption of unseaworthiness could not be met "by merely showing such a state of facts that the Court is unable to discover how the disaster occurred" and that when this situation resulted from the vessel owners' proof, the presumption nevertheless persisted and was a proper basis for finding the vessel unseaworthy. The Court said at page 657:

> "The Loveland Company, thus confronted by the presumption and being driven to rebut it, set about the task of proving the lighter's seaworthiness. This became purely an issue of fact. * * * Evidence of previous good condition has some probative value and therefore is admissible in rebutting the presumption of unseaworthiness, but clearly it is not enough alone. A party rebutting the presumption must show affirmatively that the damage was caused by a peril of the sea or other things excepted by the contract of affreightment and cannot absolve himself from blame by merely showing such a state of facts that the court is unable to discover how the disaster oc-

curred, or that it might have occurred from something which, if only it were known, is a peril of the sea." *Work* v. *Leathers*, 97 U. S. 379, 24 L. Ed. 1012; *The Queen* (D. C.), 78 F. 155; *Sauberan* v. *Wright & Cobb Lighterage Co.* (D. C.), 171 F. 449; *Tucker Stevedoring Co.* v. *Southwark Manufacturing Co.* (C. C. A.), 24 F. (2d) 410."

The Court in the *Loveland* case said at page 656:

"There is no occasion to discuss and cite authorities for the presumption of unseaworthiness of a vessel which the law raises when she sinks without any known cause."

The Court cited *The Arctic Bird* (D. C. Cal.), 109 Fed. 167, and referred to the opinion of this Court in *DuPont de Nemours* v. *Vance*, 19 How. 162, as quoted in that case.

The Circuit Court of Appeals for the Second Circuit in the present case criticised the quotation from *DuPont* v. *Vance*, by the Circuit Court of Appeals for the Third Circuit in *S. C. Loveland Co.* v. *Bethlehem Steel Co.*, 33 F. (2d) 655, as erroneous (R. 343), and pointed out that the erroneous quotation originated in the opinion in the *Oregon Round Lumber Co.* v. *Portland & A. S. S. Co.*, 162 Fed. 912, 921, where the Court misplaced quotation marks in quoting from the opinion in *The Arctic Bird*. The only effect of this error is that what purports to be a quotation from *DuPont* v. *Vance* is in fact a paraphrase from this Court's opinion in *Work* v. *Leathers*, 97 U. S. 379, 380, which is also directly and correctly quoted in the same opinion, *Oregon Round Lumber Co.* v. *Portland & A. S. S. Co.*, 162 Fed. 912, 921. We submit that this criticism by one Circuit Court of Appeals of another creates just that sort of confusion in the law that a

writ of certiorari from this Court was intended to correct.

After the Circuit Court of Appeals cited some sixteen cases which uniformly held that the unexplained sinking of a vessel raises the presumption of unseaworthiness, it proceeded to say that such a presumption did not necessarily mean that it was for the shipowner to "persuade the Court of the ship's seaworthiness" (R. 343). We submit that none of the cases cited by the Circuit Court of Appeals gives the slightest support for the view that the burden was not upon the shipowner to persuade the Court of the ship's seaworthiness. Indeed, many of them state the contrary. When the Circuit Court of Appeals was confronted with one of its former decisions—*The Harper No. 145*, 42 F. (2d) 161, where it had held that "The owner has the burden of proving its barge was seaworthy when the chalk was loaded", that Court contented itself by saying: "It is impossible to be sure that we meant more than" that the presumption of unseaworthiness arising in such case results in shifting of the "burden of going forward with the evidence" (R. 344). Such a view of the law is sharply in conflict with the views of the Third Circuit in *S. C. Loveland Co. v. Bethlehem Steel Co.*, 33 F. (2d) 655, at page 657:

> "A party rebutting the presumption must show affirmatively that the damage was caused by a peril of the sea or other things excepted by the contract of affreightment and cannot absolve himself from blame by merely showing such a state of facts that the court is unable to discover how the disaster occurred, or that it might have occurred from something which, if only it were known, is a peril of the sea."

In the Third Circuit, preceding the decision in *S. C. Loveland Co. v. Bethlehem Steel Co., supra*, that Court, in the case of *The John Twohy* (C. C. A. 3) 279 Fed. 343, 344 (reversed on other grounds 255 U. S. 77), held:

> "The libellant's first claim is for damages to the cargo. The schooner's liability arises from her warranty of seaworthiness, *The Edwin I. Morrison*, 153 U. S. 199, 14 Sup. Ct. 823, 38 L. Ed. 688, under the obligation of shipowners to provide a seaworthy vessel unless by the terms of the charter-party they limit their obligation to the exercise of due care to make her so. *The Carib Prince*, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181; *The Wildcroft*, 201 U. S. 378, 26 Sup. Ct. 467, 50 L. Ed. 794. There was nothing in the charter-party limiting this obligation. *Therefore the burden of affirmatively proving her seaworthiness at the commencement of the voyage, as well as sustaining the defense that the damage to the cargo was due to perils of the sea within exceptions of the charter-party and bill-of-lading, rests upon the owners. International Navigation Co. v. Farr & Bailey Co.*, 181 U. S. 218, 21 Sup. Ct. 591, 45 L. Ed. 830; *The Wildcroft, supra.* We find the owners have not sustained this burden." (Italics ours.)

For conflict with the Circuit Court of Appeals for the Fourth Circuit, see Bank Line Ltd. v. Porter, 25 F. (2d) 843, 845.

In *Bank Line, Ltd. v. Porter*, 25 F. (2d) 843, 845, the Court said: "If there is any doubt as to the seaworthiness of the vessel, that doubt 'must be resolved against the shipowner and in favor of the shipper'. *The Southwark*, 191 U. S. 1." Here the Circuit Court of Appeals for the Second Circuit says that the doubt must be resolved in favor of the shipowner.

For conflict with the Circuit Court of Appeals for the Fifth Circuit, see Gardner v. Dautzler Lumber & Export Co., Inc., 98 F. (2d) 478, 479, where the Court said: "The burden was on the respondents [vessel owners] to prove she was seaworthy."

The Circuit Court of Appeals for the Fifth Circuit uniformly places the burden on the shipowner. It has not only done so in *Gardner v. Dautzler Lumber & Export Co., Inc.*, 98 F. (2d) 478, 479, but also in *O. Y. Tonnage, A. B. v. Texas Co.*, 296 Fed. 893, 896, and in *Compania Naviera Mexicana, S. A. v. Spoel* (C. C. A. 5) 11 F. (2d) 777.

For conflict with the Circuit Court of Appeals for the Ninth Circuit, see Pacific Coast S. S. Co. v. Bancroft-Whitney Co., 94 Fed. 180. In that case the Circuit Court of Appeals for the Fifth Circuit applied the principles of *The Edwin I. Morrison, supra.* The situation in that case was similar to that presented here in that the attempted explanation of the respondent, vessel owner failed to disclose the cause of the damage. The Court pointed out that this led to an inference that the facts had not been fully disclosed. The Court adopted the language of Judge Hoffman in *The Compta* (D. C. Cal.) 4 Sawy. 375, Fed. Cas. No. 3069. The Circuit Court of Appeals for the Ninth Circuit said at page 200:

> "The broad statement is clearly made that it is the duty of the owner, in order to relieve himself, 'to show that the damage arose from a sea peril'. It necessarily follows that, if such facts are known to him, he must prove them. 'It is not enough for him to show that it might have arisen from that cause. He must prove that it did.' If the facts are known to him then the other methods of proof suggested by Judge Hoffman may be resorted to—their suf-

ficiency, of course, to be determined by the court. Common sense and sound reason appeal strongly to the conscience of the court, against the adoption of any rule that would allow the claimant to withhold the facts within his knowledge, and rely solely on the theory of presumption."

The Court then summarized the decision of this Court in *The Edwin I. Morrison, supra*, and reached the following conclusion:

"Upon all the evidence contained in the record, we are of opinion that the court did not err in its conclusion that *the burden of proof rested upon the claimant to show that the leak, which was the direct cause which led to the damage of the goods by sea-water, occurred by the danger of the sea*, and that in the absence of any such proof the presumption of the law is that the damage was occasioned either from the unseaworthiness of the steamer, or from the carelessness or negligence of the officers and crew on board. In either event the claimant and the steamer would be liable." (Italics ours.)

In the case of *The Babin Chevrage* (C. C. A. 9), 208 Fed. 966, the same Court said at page 973:

"Where damage to cargo has been sustained by admission of seawater into the ship during the voyage, and this fact is established, *the burden is cast upon the owner, under a charter party such as has been entered into here, to show not only seaworthiness, but that the cause of damage is attributable to perils of the sea, such as come within the purview of the stipulated exceptions.* This proposition we understand to be fully conceded by proctors for appellees." (Italics ours.)

In the case of *The Indien* (C. C. A. 9), 71 F. (2d) 752, at page 755, the same Court said:

> "*At the outset, it must be borne in mind that the burden of proving the vessel's seaworthiness rests upon the shipowner.* Any doubt must be resolved against him, 'with the presumption in favor of the appellee that it was the fault of the appellant.' *The Jeannie* (C. C. A. 9), 236 F. 463, 470." (Italics ours.)

It is clear from these cases from the Third, Fourth, Fifth and Ninth Circuits that the present decision is out of line with these Circuits and that there is, since the present decision came down, a sharp conflict between the Circuits. Indeed, in order to secure any judicial approval of its position, the Circuit Court of Appeals for the Second Circuit in this case has had to resort to English cases.

The English cases cited in the opinion of the Circuit Court of Appeals establish no different rule from that applied in the Third, Fourth, Fifth and Ninth Circuits. *Watson* v. *Clark*, 1 Dow. 336, was an action on a policy of insurance. The defense as to the warranty in a policy of insurance is on the insurer who seeks to avoid his contract, as it is also on the carrier who fails to perform his contract. Nevertheless it was held that a presumption of unseaworthiness arose where the vessel leaked badly immediately after sailing and that "the *onus probandi*, in such a case, rested with the assured, to show that the inability arose from causes subsequent to the commencement of the voyage" (p. 344). *Pickup* v. *Thames Insurance Co.*, L. R. 3 Q. B. 594 (1878) was a similar case involving instructions to the jury as the trier of the facts. In that case the ship had been at sea eleven days before the disability arose and there was a question for the

jury as to whether any inference was to be drawn from this circumstance. *Ajum Goolam Hossen & Co.* v. *Union Marine Ins. Co.* (1901), A. C. 362 was also an action on an insurance policy. The Court held that the presumption of unseaworthiness was to be considered with other circumstances developed by the testimony, *i. e.*, offered in rebuttal. The substance of the decision in *Lindsey* v. *Klein*, 1911 A. C. 194 is no more than that when those alleging unseaworthiness show that the vessel foundered or broke down "shortly after setting sail, they start with a body of evidence raising a natural presumption against seaworthiness, which presumption, however, may, of course, be overborne by proof that the loss or damage to the vessel occurred from a cause or causes of a different character" (p. 205). The decision in this case was commented upon by the Circuit Court of Appeals for the Second Circuit in *Societa Anonima Cantiero Olivo* v. *Fed. Ins. Co.*, 62 F. (2) 769, at page 771, in the following language:

> "Some of the language in *Klein* v. *Lindsey*, L. R. (1911) A. C. 194, seems to look the other way, but we are not clear just what was the final conclusion. Lord Shaw said that normally the burden was on the cargo to prove unseaworthiness, though breakdown of machinery soon after breaking ground, coupled with the ship's history, in that case turned the scale. At the same time he quoted with apparent approval the language of the Lord Ordinary below, to the effect that a breakdown under ordinary use shifted the burden of proof back upon the ship" (p. 771).

Irrespective of the looseness of the language used, it is clear that the presumption of unseaworthiness in that case was the basis of the finding that the ship was, in fact, unseaworthy.

We respectfully submit that the present decision in the Second Circuit, where a large number of Admiralty cases are tried, conflicts so completely with the decisions of the Third, Fourth, Fifth and Ninth Circuits, that confusion is certain to result. Moreover, if the present decision is not reversed it will relax the "important and salutary rule with respect to seaworthiness" which this Court in *The Edwin I. Morrison*, 153 U. S. 119, felt should be maintained. For these reasons we respectfully urge that the decision below should be reviewed by this Court. Otherwise the law in the various circuits cannot be reconciled and there will be a want of uniformity in the Admiralty Law which will work great harm.

POINT III.

The decision of the District Court excusing the vessel owner from its obligation to furnish a seaworthy ship by reason of the agreement of the cargo owner to obtain insurance was clearly incorrect and should have been reviewed and reversed by the Circuit Court of Appeals.

A warranty of seaworthiness exists in insurance policies, as well as in contracts of affreightment, and a contract to insure does not involve a contract to insure against a shipowner's own failure to see that his vessel is seaworthy; for if it did the goods owner might find himself without a remedy against his insurer as well as against the carrier.

The contract to obtain insurance cannot be interpreted to mean insurance against loss from any possible cause.

The Titania, 19 Fed. 101, 104;
The Egypt, 25 Fed. 320, 329.

A policy of insurance on cargo is subject to an implied warranty of seaworthiness exactly as is a policy of insurance on a vessel. Arnold on Marine Insurance, 11th Ed., Sec. 689, p. 899.

An insurance policy does not ordinarily insure against a loss by reason of unseaworthiness.

New Orleans T. & M. Ry. Co. v. *Union Marine Ins. Co., Ltd.* (C. C. A. 5), 286 Fed. 32;
Carp v. *Home Ins. Co.*, 235 N. Y. 296, 301.

In this case the warranty of seaworthiness was express, placed at the beginning of the contract of carriage (R. 262). The subsequent provision with respect to insurance (R. 263) contains no express reference to the preceding provision nor any express modification of the obligation assumed to provide a seaworthy vessel. It was clearly not intended to modify or override the express obligation of the vessel owner to furnish a seaworthy vessel.

In the case of *The Caledonia*, 157 U. S. 124, at page 137, this Court said:

> "As is well said by counsel for appellee, the exceptions in a contract of carriage limit the liability but not the duty of the owner, and do *not in the absence of an express provision, protect the shipowner against the consequences of furnishing an unseaworthy vessel. Steel* v. *State Line Steamship Company*, 3 App. Cas. 72; *Gilroy* v. *Price*, App. Cas. (1893) 56; *The Glentruin*, 10 P. D. 103; *Kopitoff* v. *Wilson*, 1. Q. B. D. 377; *Tattersall* v. *National Steamship Company*, 12 Q. B. D. 297; *Thames & Mersey Ins. Company* v. *Hamilton*, 12 App. Cas. 484, 490. *If the exceptions are capable of, they ought to receive*, to

use the language of Lord Selborne in *Steel* v. *Steamship Company*, *"a construction not nullifying and destroying the implied obligation of the shipowner to provide a ship proper for the performance of the duty which he has undertaken."* (Italics ours.)

Again in the *Carib Prince*, 170 U. S. 655, at 659, this Court said:

> "In other words, that where *the owner desires the exemption to cover a condition of unseaworthiness existing at the commencement of the voyage, he must unequivocally so contract."* (Italics ours.)

In the case of *Callen Fuel Co.* v. *W. E. Hedger*, 298 U. S. 82 at 88, this Court said:

> "The warranty of seaworthiness is implied from the circumstances of the parties and the subject matter of the contract and may be negatived only by *express covenant."* (Italics ours.)

The Framlington Court (C. C. A. 5), 69 F. (2d) 300.

The provision with respect to insurance should not receive an interpretation nullifying the express agreement of the shipowner to furnish a seaworthy vessel. The two clauses should be read together and given an interpretation giving reasonable effect to both.

Cliff v. *DuPont*, 298 Fed. 649, 652;
United States v. *A. Bentley & Sons Co.*, 293 Fed. 229, 242.

This principle requires a limitation of the effect of the insurance provision to losses due to other causes than unseaworthiness, for instance, negligence not connected with unseaworthiness.

The insurance provision does not excuse the vessel owner from his express obligation to furnish a seaworthy vessel. *Sanbern* v. *Wright & Cobb Lighterage Co.*, 171 Fed. 449, 454, aff'd (C. C. A. 2) 179 Fed. 1021. The House of Lords took this view of the matter in the English case of *James Nelson & Sons, Ltd.* v. *Nelson Line, Ltd.*, 1908 A. C. 16, 19, affirming the decision of the Court of Appeals to the same effect 1907, 1 K. B. 769, 779, 782.

CONCLUSION.

Because the decision of the Circuit Court of Appeals is in direct conflict with the decisions of this Court and the Circuit Courts of Appeal for the Third, Fourth, Fifth and Ninth Circuits; because the decision is on an important principle of Maritime Law of wide application affecting every contract for the carriage of goods by water, and because the necessity for uniformity among the circuits in the Admiralty Law as administered by them has been repeatedly recognized by this Court, we respectfully submit that a writ of certiorari should be granted in order that the questions presented herein may be definitely and finally decided.

Respectfully submitted,

T. CATESBY JONES,
LEONARD J. MATTESON,
Proctors for Petitioner.